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APR 19 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| In re the Marriage of: | 2 CA-CV 2009-0130 |
| | DEPARTMENT A |
| KATHLEEN D. MEDEIROS, nka SHOOK, | |
| | MEMORANDUM DECISION |
| Petitioner/Appellant, | Not for Publication |
| | Rule 28, Rules of Civil |
| and | Appellate Procedure |
| | |
| JAMES L. HOWARD, JR., | |
| | |
| Respondent/Appellee. | |

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. DO-200500299

Honorable Charles A. Irwin, Judge

AFFIRMED

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Bays Law PC
By P. Randall Bays
Sierra Vista
Attorney for Petitioner/Appellant

Wade Law Firm, PLC
By Grady S. Wade
Tucson
Attorney for Respondent/Appellee

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H O W A R D, Chief Judge.

**¶1** In this dissolution-of-marriage action, appellant Kathleen Medeiros appeals following an order granting appellee James Howard physical custody of their children and denying her motion for new trial. She argues that the trial court did not make the required findings and improperly considered her disability. For the reasons that follow, we affirm.

## Factual and Procedural Background

**¶2** We view the facts in the light most favorable to upholding the trial court's ruling. *See In re Marriage of Yuro*, 192 Ariz. 568, ¶ 3, 968 P.2d 1053, 1055 (App. 1998). The parties' marriage was dissolved in 2005, and Medeiros was granted physical custody of their three children. Howard later filed a petition to prevent Medeiros from moving out of state and to change physical custody of the children to his care. As to the physical custody arrangement, Howard claimed it was not in the children's best interests to remain with Medeiros due to her disability. The trial court granted Howard's motion to change physical custody. Medeiros filed a motion for new trial, which the court denied. This appeal followed.

## Jurisdiction

**¶3** We must first address the jurisdictional issue raised by Howard, who argues that this court does not have jurisdiction to review the final judgment of the trial court because it was not included in the notice of appeal as a judgment from which appeal was taken. Medeiros filed a notice of appeal on July 20, 2009, stating that she appeals "from the Order made and entered in this action on the 10th day of July, 2009." The notice

further states, "In the Order entered on July 10, 2009, the Court DENIED Petitioner's Motion for New Trial regarding the Court's Order Changing Physical Custody of May 19, 2009." Indeed, the denial of Medeiros's motion for a new trial was the only order "made and entered" on July 10, 2009.

**¶4** Rule 8(c), Ariz. R. Civ. App. P., requires, inter alia, that the notice of appeal "designate the judgment . . . appealed from." This court does not acquire jurisdiction to review matters not identified in this notice. *Flagstaff Vending Co. v. City of Flagstaff*, 118 Ariz. 556, 561, 578 P.2d 985, 990 (1978); *Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App. 1982). We may construe a notice of appeal liberally. *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 30, 972 P.2d 676, 683 (App. 1998). Technical defects such as incorrect dates are not fatal to the appeal. *See, e.g., Hanen v. Wills*, 102 Ariz. 6, 9-10, 423 P.2d 95, 98-99 (1967) (finding jurisdiction despite notice of appeal citing date of minute entry about judgment rather than date final judgment entered); *Udy v. Calvary Corp.*, 162 Ariz. 7, 10-11, 780 P.2d 1055, 1058-59 (App. 1989) (notice of appeal naming as appellants only parents, not son on whose behalf suit was brought, was simple technical defect and did not preclude appeal on his behalf). But we cannot disregard the plain requirements of Rule 8(c) and infer from the notice something that is not actually there. *Baker v. Emmerson*, 153 Ariz. 4, 8, 734 P.2d 101, 105 (App. 1986) (original notice of appeal from earlier judgment that failed to dispose of claim against a party insufficient to appeal from amended judgment adding the party).

**¶5** Medeiros's notice of appeal did not specify that she was appealing from the judgment entered. Rather, it stated she was appealing from the denial of her motion for new trial and did not express an intent to appeal from the underlying judgment. *See Hanen*, 102 Ariz. at 9-10, 423 P.2d at 98-99. After the issue was raised in Howard's brief and in an attempt to remedy the omission, Medeiros filed in this court a "motion for leave to amend notice of appeal." No opposition having been filed, the clerk of the court granted her motion, and Medeiros then filed an amended notice of appeal on March 22, 2010. However, filing an untimely amended notice of appeal cannot cure the failure to include the judgment in the timely notice, *see* Ariz. R. Civ. App. P. 9(b) (allowing for extensions of time to appeal but making no provisions for untimely amended notice of appeal), nor can it vest this court with jurisdiction that it did not otherwise possess, *see Lount v. Strouss*, 63 Ariz. 323, 325-26, 162 P.2d 430, 431 (1945) (appeal taken only in time and manner provided by law). Because the deadline for filing a notice of appeal in this case had passed, *see* Ariz. R. Civ. App. P. 9, Medeiros's amended notice of appeal has no effect.

**¶6** Citing *McKillip v. Smitty's Super Valu, Inc.*, 190 Ariz. 61, 945 P.2d 372 (App. 1997), Medeiros asserts that this court has jurisdiction to review the judgment even without an amended notice. In *McKillip*, the notice of appeal only included the trial court's denial of a motion for judgment notwithstanding the verdict, but we accepted jurisdiction over the final judgment nevertheless. 190 Ariz. at 63-64, 945 P.2d at 374-75. However, we also pointed out that an order denying a motion for judgment

notwithstanding the verdict is not itself appealable. *Id.* at 63, 945 P.2d at 374. Furthermore, we stated that, by attempting to appeal from the denial of a judgment notwithstanding the verdict, the McKillips "transparently attempted to appeal from the judgment itself." *Id.* at 64, 945 P.2d at 375.

**¶7** The circumstances here are distinguishable from those in *McKillip* because an order denying a motion for new trial is an appealable order. *See* A.R.S. § 12-2101(F)(1). As a result, Arizona courts have accepted jurisdiction over an appeal from the denial of a motion for new trial without reviewing the underlying judgment. *See, e.g.*, *Matcha v. Winn*, 131 Ariz. 115, 116-17, 638 P.2d 1361, 1362-63 (App. 1981). Additionally, the original notice of appeal in this case does not show an intent or attempt to appeal from the underlying judgment. *See McKillip*, 190 Ariz. at 64, 945 P.2d at 375; *Hanen*, 102 Ariz. at 9-10, 423 P.2d at 98-99. And, although we agree with Medeiros that Howard would suffer no prejudice if we had jurisdiction of the appeal from the judgment, a lack of prejudice cannot expand the notice of appeal any more than it could confer jurisdiction on this court over a notice of appeal filed one day late. *See Todd v. Todd*, 137 Ariz. 404, 407-08, 670 P.2d 1228, 1231-32 (App. 1983) (appeal dismissed for lack of jurisdiction where notice of appeal was date-stamped one day late, despite evidence showing notice had been timely mailed). Therefore, we do not have jurisdiction to review the trial court's final judgment, and our review is limited to the court's denial of Medeiros's motion for new trial.

**Required Findings**

**¶8** Medeiros first argues the trial court erred by "failing to make specific findings on the record . . . as required by A.R.S. § 25-403(A) and (B)." However, because she did not raise this issue in her motion for a new trial, we cannot review it on appeal. *See Rourk v. State*, 170 Ariz. 6, 12, 821 P.2d 273, 279 (App. 1991) (when appeal taken "solely from an order denying a motion for new trial," issues addressed on appeal are only those raised in motion for new trial).

**Findings Regarding the Best Interests of the Children**

**¶9** Medeiros further contends the trial court erred in denying her motion for a new trial because the court's findings of fact did not "address the causal connection between [Medeiros's] disability and its negative effect on the welfare of the children or her ability to adequately parent her children[,] as required by A.R.S. § 25-403(B)." A family court may grant a new trial if "the ruling, decision, findings of fact, or judgment is not justified by the evidence or is contrary to law." Ariz. R. Fam. Law P. 83(A)(6). We review for an abuse of discretion a court's denial of a motion for a new trial. *Gersten v. Gersten*, 223 Ariz. 99, ¶ 6, 219 P.3d 309, 312 (App. 2009).

**¶10** Analogizing this case to *In re Pima County Juvenile Action No. B-10489*, 151 Ariz. 335, 727 P.2d 830 (App. 1986), Medeiros asserts the court erred because the "and" linking the two clauses in § 25-403(B) should be interpreted to require a causal link between the factual findings for each relevant factor and the court's analysis of the best interests of the child. Section 25-403(B) reads: "In a contested custody case, the

court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child."

**¶11** However, neither the plain language of the statute nor the case law supports Medeiros's interpretation. *See Thompson v. Thompson*, 217 Ariz. 524, ¶ 8, 176 P.3d 722, 724 (App. 2008) (court first looks to plain language of statute to determine its meaning). The "and" in § 25-403(B) is merely an instruction to the family court that, in addition to making findings about each of the relevant factors, it must also make specific findings about why its decision is in the child's best interest. *Downs v. Scheffler*, 206 Ariz. 496, ¶ 8, 80 P.3d 775, 778 (App. 2003). Given the plain language of § 25-403(B) and the case law interpreting it, we cannot conclude the court's judgment was contrary to the law. Consequently, the trial court did not abuse its discretion in denying Medeiros's motion for a new trial on this issue.

**Res Judicata**

**¶12** Medeiros finally argues that the trial court erred by not granting her a new trial because it improperly considered her disability in this proceeding when the issue was precluded by the doctrine of res judicata. Howard contends in his answering brief that Medeiros did not raise the res judicata issue until her motion for new trial below. Medeiros's reply brief does not refute that assertion.

**¶13** An issue raised for the first time in a motion for new trial is deemed to have been waived. *Conant v. Whitney*, 190 Ariz. 290, 293, 947 P.2d 864, 867 (App. 1997). Medeiros did not assert the defense of res judicata until her motion for a new trial, so she

has waived it. Therefore, we cannot conclude that the court abused its discretion in denying the motion for new trial on this ground.

**Attorney Fees**

**¶14** Both parties request attorney fees and costs on appeal. Medeiros provides no basis for her request, and we deny it. Howard asserts three bases for his request: "A.R.S. § 12-341(C)," § 25-324, and Rule 31, Ariz. R. Fam. Law P. Section 25-324 allows a court to award fees "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." Medeiros did not oppose Howard's claim for attorney fees in her reply. Thus, after considering the reasonableness of the parties' arguments, we grant Howard's request and award him reasonable attorney fees on appeal upon his compliance with Rule 21, Ariz. R. Civ. App. P.

**Conclusion**

**¶15** In light of the foregoing, we affirm the trial court's denial of Medeiros's motion for a new trial.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge